

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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BANK OF AMERICA, N.A., SUCCESSOR  
BY MERGER TO BAC HOME LOANS  
SERVICING, LP; FKA COUNTRYWIDE  
HOME LOANS SERVICING, LP,

Case No. 2:16-cv-00691-MMD-GWF  
ORDER

(Def.'s Countermotion to Stay  
– ECF No. 64)

v-

**Plaintiff,**

SPANISH BAY HOMEOWNERS  
ASOCIATION; NEVADA ASSOCIATION  
SERVICES, INC.; SFR INVESTMENTS  
POOL 1, LLC.

## Defendants.

This case arises out of a homeowner association's ("HOA") foreclosure and involves the notice provisions applicable to foreclosure sales under Nevada Revised Statutes ("NRS") Chapter 116. Before the Court is Defendant SFR Investments Pool 1, LLC's ("SFR") Motion to Stay. (ECF No. 64.) Plaintiff Bank of America, N.A. ("BANA") has opposed (ECF No. 66), and SFR has replied (ECF No. 70).

A district court has discretionary power to stay proceedings in its own court. *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). “A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.” *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). In deciding whether to grant a stay, courts should consider “the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being

1 required to go forward, and the orderly course of justice measured in terms of the  
2 simplifying or complicating of issues, proof, and questions of law which could be expected  
3 to result from a stay.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005)  
4 (quoting *Landis*, 299 U.S. at 268). Courts should also consider “the judicial resources that  
5 would be saved by avoiding duplicative litigation.” *Pate v. DePuy Orthopaedics, Inc.*, No.  
6 2:12-cv-01168-MMD-CWH, 2012 WL 3532780, at \*2 (D. Nev. Aug. 14, 2012) (quoting  
7 *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997)).

8         The Court finds that significant judicial resources will be saved if the Court refrains  
9 from issuing a decision in this case until the Nevada Supreme Court determines whether  
10 NRS § 116.31168 incorporates the notice provisions of NRS § 107.090. (ECF No. 64 at  
11 7 (citing Nev. S. Ct. Case No. 72931).) NRS §§ 116.31168 and 107.090 prescribe two  
12 fundamentally different notice mechanisms. The first requires lenders to affirmatively  
13 request notice of foreclosure sales from HOAs. The second requires HOAs to notify  
14 lenders as a matter of course, regardless of whether a request was made.

15         The Ninth Circuit recently held the first mechanism facially unconstitutional  
16 because it impermissibly shifts the burden to lenders in violation of their procedural due  
17 process rights. *Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1156  
18 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2296 (2017). NRS § 107.090 seems to ameliorate  
19 this burden-shifting problem by requiring the HOAs to provide notice to lenders absent  
20 any request from lenders for notice; however, the Ninth Circuit has held that NRS §  
21 107.090 is not incorporated in NRS § 116.31168. *Id.* at 1159. If it were, the Ninth Circuit  
22 reasoned, the opt-in notice scheme would be superfluous. *Id.*

23         The question of whether NRS § 116.31168 incorporates NRS § 107.090 is now  
24 pending before the Nevada Supreme Court in Case No. 72931. Moreover, that court has  
25 hinted it will answer the question in the affirmative. See *Nationstar Mortg., LLC v. Saticoy*  
26 *Bay LLC Series 227 Shadow Canyon*, 405 P.3d 641, 648 n.11 (Nev. 2017). If the Nevada  
27 Supreme Court holds that NRS § 107.090 is incorporated, then a factual question would  
28 arise in this case: did the HOA provide notice to the lender consistent with NRS §

1 107.090? As the law stands currently, it is irrelevant whether the HOA provided notice to  
2 the lender—foreclosure sales conducted pursuant to Chapter 116 could not have satisfied  
3 the lenders' constitutional due process rights. See, e.g., *U.S. Bank, N.A. v. Emerald Ridge*  
4 *Landscape Maint. Ass'n*, No. 2:15-cv-00117-MMD-PAL, 2017 WL 4386967, at \*3 (D. Nev.  
5 Sept. 29, 2017). But if NRS § 116.31168 incorporated NRS § 107.090, then some  
6 foreclosure sales may have satisfied constitutional due process requirements (i.e., those  
7 in which HOAs gave lenders notice consistent with NRS § 107.090). SFR contends that  
8 it is undisputed that the HOA provided such notice in this case (ECF No. 65 at 2), and  
9 BANA does not contest this assertion (see ECF No. 67).

10 BANA first opposes SFR's motion on the ground that the Nevada Supreme Court  
11 is likely to answer the certified question in the negative. (ECF No. 67 at 4.) As evidence,  
12 BANA cites this Court's discussion of a Nevada Supreme Court case, *U.S. Bank, N.A. v.*  
13 *SFR Investments Pool 1, LLC*, 124 F. Supp. 3d 1063, 1079 (D. Nev. 2015) (discussing  
14 *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 411 (Nev. 2014)). (ECF No. 66 at  
15 4.) The excerpt BANA provides, however, essentially demonstrates that it is unclear how  
16 the Nevada Supreme Court views NRS § 107.090 in relation to NRS § 116.31168:

17 The Nevada Supreme Court itself has noted that the Nevada Legislature  
18 had declined to adopt the Uniform Common Interest Ownership Act's  
19 ("UCIOA") recommendation of "reasonable notice . . . to all lien holders of  
20 the unit whose interest would be affected" in favor of its own particularized  
21 notice provisions under Chapter 116. Critically, although the Nevada  
22 Supreme Court noted that NRS 107.090 is incorporated by section  
23 116.31168(1), in the very same paragraph, and even when specifically  
24 citing to NRS 107.090(3)(b) and (4) (the provisions requiring mailed notice  
25 of NODs and NOSs to junior lienors of record in deed of trust foreclosures),  
26 the Court concluded that notice to a lienor of record requires the lienor to  
27 have notified the HOA of the interest before the recordation of the NOD or  
28 mailing of the NOS under NRS 116.31163 and 116.311635, respectively.  
This shows that the Nevada Supreme Court either reads NRS 116.31168  
not to incorporate the automatic notice provisions of NRS 107.090(3)-(4) or  
that it reads the opt-in provisions of NRS 116.31163 and 116.311635 to  
supersede NRS 107.090(3)-(4)'s automatic notice provisions as to HOA  
foreclosures even if NRS 107.090 is otherwise incorporated into Chapter  
116 foreclosures generally via NRS 116.31168.

27 *U.S. Bank, N.A.*, 124 F. Supp. 3d at 1079. In essence, this Court attempted to resolve an  
28 inconsistency between what the Nevada Supreme Court said (that NRS § 107.090 is

1 incorporated) and what it did (holding that notice had to be requested despite NRS §  
2 107.090's requirement that notice be provided as a matter of course). This Court  
3 concluded that the Nevada Supreme Court must have meant that NRS § 107.090 was  
4 only selectively incorporated. While this Court's reasoning is sensible, it is nonetheless  
5 speculative. It remains unclear whether the Nevada Supreme Court will find that NRS §  
6 107.090 is incorporated, selectively or otherwise.

7 BANA next opposes SFR's motion on the ground that NRS § 116.31168 is  
8 unconstitutional even if NRS § 107.090 is incorporated. (ECF No. 67 at 5.) While the  
9 constitutionality of NRS § 107.090 is a serious issue that the parties will no doubt dispute  
10 if the Nevada Supreme Court holds that NRS § 107.090 is incorporated, that issue is not  
11 presently before this Court. See *Clinton v. Jones*, 520 U.S. 681, 690 (1997) ("[W]e have  
12 often stressed the importance of avoiding the premature adjudication of constitutional  
13 questions.").

14 In addition, BANA insists that a stay will be prejudicial because it suffers economic  
15 harm as long as SFR claims to hold clear title: "BANA cannot foreclose until this litigation  
16 is resolved. While SFR continues to collect rent, BANA is required to pay taxes and  
17 insurance charges on its defaulting borrowers' behalf to protect its interest." (ECF No. 67  
18 at 5.) However, any damage to BANA from a stay will be outweighed by the fees that all  
19 parties will surely incur from continued litigation—the Nevada Supreme Court's decision  
20 could moot a decision by this Court. Until there is finality on the issue of whether NRS §  
21 116.31168 incorporates NRS § 107.090, a stay will benefit the parties and conserve  
22 judicial resources.

23 It is therefore ordered that SFR's countermotion to stay (ECF No. 64) is granted.  
24 This action is temporarily stayed until resolution of the certified question in Nev. S. Ct.  
25 Case No. 72931. The stay will be lifted upon such resolution. The parties must file a status  
26 report within five (5) days from such resolution. All pending motions (ECF Nos. 56, 59,  
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1 65) are denied without prejudice and may be refiled within thirty days from the Nevada  
2 Supreme Court's decision on the certified question.

3 DATED THIS 22<sup>nd</sup> day of December 2017.



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5 MIRANDA M. DU  
6 UNITED STATES DISTRICT JUDGE  
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